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PRODUCE EXCEPTIONALISM: EXAMINING THE LEAFY GREENS MARKETING AGREEMENT AND ITS ABILITY TO IMPROVE FOOD SAFETY

*Varun Shekhar**

I. INTRODUCTION

Isolated food safety crises are not uncommon occurrences in the United States. Indeed, the history of public scares indicates a pattern of deficiencies in the safety of the American food supply. In the early 20th century, the public learned of the squalid conditions of meatpacking facilities through muckraking publications such as Upton Sinclair's *The Jungle*.[1] In the 1980s, a *60 Minutes* report documented research finding carcinogenic properties of a widespread pesticide, traces of which were commonly found in apple-based products.[2] In the 1990s, widespread media reports of beef tainted with E. coli[3] led to both product recalls unprecedented in scope and massive sales losses in the beef and fast-food industries.[4]

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1. UPTON SINCLAIR, THE JUNGLE (Signet Classics ed. 1998) (1906).

2. Daminozide, commonly known as Alar, is a chemical used to enhance apples during the 1970s and 80s. In the late 1980s, research had shown a correlation between Alar exposure and tumor development in animals. In response, consumer groups called for the ban of Alar use on crops, which the EPA implemented. Since then, further research has indicated that the minimum administration amount of Alar before expressing carcinogenic properties is far higher than normal human consumption. Today, the ordeal of the late 1980s is commonly referred to as the "Alar scare." *See* Environmental Working Group, *Myth of Alar Scare Persists*, ENVIRONMENTAL WORKING GROUP (Feb. 1, 1999), http://www.ewg.org/book/export/html/8004.

3. The E. coli O157:H7 strain of bacteria is one of the most formidable pathogens responsible for severe foodborne illness. An E. coli O157 bacterium produces verotoxin and shiga-like toxins, damaging the host's intestinal lining and causing severe, "grossly bloody" diarrhea. *See Foodborne Pathogenic Microorganisms and Natural Toxins Handbook: Escherichia coli O157:H7*, FDA.GOV, http://www.fda.gov/Food/FoodSafety/FoodborneIllness/FoodborneIllnessFoodbornePathogensNaturalToxins/BadBugBook/ucm07 1284.htm (last visited Sept. 17, 2010). Although infection from E. coli O157 is uncommon, the bacterium is most lethal to young children (who may develop hemolytic uremic syndrome (HUS), causing kidney failure) and the elderly (who suffer a mortality rate as high as 50% from O157 infection). *Id.*

4. Two incidents marred the beef industry through the 1990s. First, in 1993, several deaths were attributed to consumption of contaminated beef from the fast-

In this decade, fresh produce has been the source of one of the largest outbreaks of foodborne illness in American history.[5] But perhaps the most noteworthy distinguishing factor between each of these incidents has been the relative amount of top-down regulations imposed immediately after the resulting scare. Not coincidentally, federal legislation requiring agency inspection of all meat products passed in the same year as *The Jungle* was published.[6] In 1989, the EPA banned the use of the Alar pesticide.[7] Federal and/or state regulation, therefore, has become accepted as a standard part of day-to-day operations for the majority of agricultural industries.[8]

On the other hand, the fresh produce industry has seemingly rested in an isolated bubble, untouched by agency hands.[9] This absence of a true regulatory framework has perhaps been most pronounced in the leafy produce industry - one of the largest and fastest growing produce sectors, including cultivation of spinach, lettuce, and cabbage.[10] Before 2006, no mandates were imposed on

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food chain Jack in the Box *Jack in the Box E. coli Outbreak - Western States,* MARLERCLARK.COM., http://www.marlerclark.com/case_news/view/jack-in-the-box-e-coli-outbreak-western-states (last visited Sept. 20, 2010). Second, in 1997, the Hudson Foods Company recalled over 25 million pounds of ground beef (much of which had been sold to the fast-food chain Burger King), amounting to the largest food recall in U.S. history. *See* Press Release, USDA, USDA Announces Recall of Additional Hudson Frozen Ground Beef (Aug. 15, 1997), *available at* http://www.usda.gov/news/releases/1997/08/0276; *See also* Dana Canedy, *Businesses Remove Beef and Assure Customers*, N.Y. TIMES, Aug. 22, 1997, http://www.nytimes.com/1997/08/22/us/businesses-remove-beef-and-assure-customers.html.

5. *See* Carl Nagin, *How Safe Is Your Salad?*, San Francisco Chronicle, Dec. 16, 2007, http://articles.sfgate.com/2007-12-16/living/17272757_1_natural-selection-foods-colioutbreak-0157-h7.

6. *See* Meat Inspection Act of 1906, ch. 3913, 34 Stat. 674 (1906) (discussed in Part IIB, *infra*).

7. *See* Environmental Working Group, *supra* note 2.

8. *See, e.g.*, Meat Inspection Act, *supra* note 6 (requiring inspection of all meat products); Poultry Products Inspection Act of 1957, Pub. L. No. 85-172, 71 Stat. 441 (requiring inspection of all domesticated fowl intended for human consumption); Egg Products Inspection Act, 7 C.F.R. § 57 (2010) (requiring federal inspection of all eggs sold in interstate commerce and intended for human consumption); Hazard Analysis and Critical Control Point (HACCP) Systems, 21 CFR § 120 (2010) (requiring juice processor compliance with HACCP (discussed *infra*) regulations).

9. *See infra* notes 25-26.

10. *See Food Safety: Special Hearing Before the Subcomm. on Agriculture, Rural Development, Food and Drug Administration and Related Agencies of the S. Comm. on Appropriations*, 110th Cong. 35 (2007) (statement of Andrew C. von Eschenbach, Commissioner of Food and Drug Administation, Department of Health and Human Services) ("In the past decade, fresh produce consumption has increased, and fresh-

growers in following baseline quality-control standards.[11] Growers' interest groups controlled the dictation of which agricultural practices furthered food safety.[12] Then, the E. coli outbreak in 2006,[13] linked to contaminated spinach crops, received ubiquitous media exposure. Sales of the once blossoming leaf plummeted.[14] Restaurants reported large losses.[15] Grocers and supermarkets were forced to pull substantial stocks from their shelves.[16] Industry actors, perhaps realizing that another such outbreak could spell economic disaster for the entire industry, yet wanting to avoid top-down governmental regulation, took the lead in crafting a private, contractual marketing plan to spur better agricultural practices.[17] The arrangement, known as the Leafy Greens Marketing Agreement, has been both hailed as a model of regulatory cooperation between industry and state, and sharply criticized as an inadequate safeguard for food safety.[18] The former position, it seems, has become dominant, as

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cut produce represents a particularly fast-growing segment of the fresh produce market."). Revenue from spinach and lettuce sales alone totaled nearly two billion dollars in 2004. Matthew Kohnke, *Reeling in a Rogue Industry: Lethal E. Coli in California's Leafy Green Produce & the Regulatory Response*, 12 Drake J. Agric. L. 493, 495 (2007).

11. *See infra* notes 25-26.

12. *See infra* notes 27, 29.

13. The E. coli O157:H7 strain (discussed at *supra* note 3) was implicated as the culprit pathogen responsible for the illnesses and fatalities caused by the outbreak. *See* Nagin, *supra* note 5 ("[A] rare and particularly virulent strain of Escherichia coli 0157:H7 sickened more than 200 people across North America, hospitalizing half of them, some with severe kidney damage, and killing two elderly women and a child.").

14. *See infra* note 55.

15. *See, e.g.*, Michael Y. Park, *E. Coli Outbreak Hurts Spinach Farming Industry, Restaurants*, Fox News, Sept. 22, 2006, http://www.foxnews.com/story/0,2933, 215257,00.html ("The spinach scare has been devastating to restauranteurs like Nancy Horn, of Reno, Nev. Her 38-seat restaurant... specializes in vegetarian options, and includes spinach on several of its sandwiches. Since the outbreak, business is down on the restaurant side: Her average daily sales of $1,000 have declined between $250 and $350, and her catering business has seen 'a huge drop'"); *see also* Julie Schmit, *Spinach Producers Take Financial Hit*, USA Today, Sept. 19, 2006, http://www.usatoday.com/money/industries/food/2006-09-19-spinach-usat_x.htm.

16. *See* Press Release, FDA, FDA Statement on Foodborne E. coli O157:H7 Outbreak in Spinach (Oct. 4, 2006), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108757.htm..

17. *See* Kohnke, *supra* note 10, at 508 ("With [Governor Schwarzenegger's] veto hanging in the balance, it was up to Western Growers to prove that its industry-run program was better than a traditional, government-based food safety framework.").

18. The most vocal critics tend to be consumer advocacy organizations. *See, e.g.*, Testimony of Patty Lovera, Food & Water Watch, Before USDA Leafy Greens Mar-

federal agencies are currently considering instituting a nationwide version of California's Agreement.[19] Because of the apparent trendiness of this cooperative regulatory model, discussion of the desirability and effectiveness of such strategies is all the more important.

Focusing on the victory of the Leafy Greens Marketing Agreement in California for the purposes of improving food safety, this paper examines the responses primarily by state and regional industry actors, and provides a critical assessment of the relatively hands-off approach settled upon. The California leafy produce[20] industry is an ideal subject to focus analysis for several reasons. First, leafy produce was implicated in the 2006 outbreak, and is a sector of the produce industry in which consumer concern is high.[21] Second, leafy produce is one of the fastest growing produce sectors, making it an industry in which improvement of food safety is critical for continued growth.[22] Finally, the leafy produce industry is largely

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keting Agreement Hearing, Sept. 22-24, 2009, *available at* http://www.nationalorganiccoalition.org/Loveratestimony.pdf.

19. The federal proposal is called the "National Leafy Greens Marketing Agreement" (NLGMA). *See* Cary Blake, *Leafy Green Growers Voice NLGMA Support*, Western Farm Press, Nov. 16, 2009, at 10.

20. For the purposes of this paper, I shall adopt the definition of the term "leafy produce" as stated in the LGMA:

> "'Leafy Green Products' means iceberg lettuce, romaine lettuce, green leaf lettuce, red leaf lettuce, butter lettuce, baby leaf lettuce (i.e., immature lettuce or leafy greens), escarole, endive, spring mix, spinach, cabbage, kale, arugula and chard."

CAL. DEP'T OF FOOD AND AGRIC., CALIFORNIA LEAFY GREEN PRODUCTS HANDLER MARKETING AGREEMENT (Mar. 5, 2008), *available at* http://www.caleafygreens.ca.gov/members/documents/LGMAmarketingagreement03.08_000.pdf.

21. *See* Carlos Arnade, Linda Calvin, & Fred Kuchler, *Consumers' Response to the 2006 Foodborne Illness Outbreak Linked to Spinach*, Amber Waves, Mar. 2010, *available at* http://www.ers.usda.gov/AmberWaves/March10/Features/OutbreakSpinach.htm (finding that sales of bagged spinach is still some $2-4 million less than would be predicted without the initial food safety shock in 2006, and that consumers "rapidly responded" to the FDA's warnings); Press Release, Harris Interactive, Consumer Concern Over Product Recalls High (June 12, 2007), *available at* http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Crisis-Food-Recalls-2007-06.pdf (noting that nearly 85% of those polled were "familiar" with the 2006 spinach E. coli outbreak and that 86% expressed food safety concerns).

22. *See California's Top 10 Commodities for 2002-03*, UNIVERSITY OF CALIFORNIA, http://www.universityofcalifornia.edu/economy/agtop10.html (last visisted Sept. 15, 2010) (noting that lettuce (a leafy vegetable) was the most purchased produce crop, only behind grapes).

concentrated in California, making the interplay of state and industry actors and the public easier to analyze.[23]

Discussion of these topics will proceed in five parts. Part II of this paper will examine the history and food safety track record of the leafy produce industry before the watershed 2006 E. coli outbreak. Part III will detail the background of the outbreak, noting the investigative activity and findings by federal and state agencies. Part IV will analyze the responses proposed by state legislators and industry actors. Specifically, this section will focus upon a comparison between a state-driven regulatory proposal essentially subjecting leafy produce to top-down scrutiny similar to that found in the meat or dairy industries, and an industry-driven proposal using consumer demand as a motivating force to compel grower firms to implement effective food safety mechanisms.[24]

Part V will critically assess the proposal eventually adopted, the Leafy Greens Marketing (LGMA), noting its strengths, peculiarities, systemic problems, and, most importantly, its potential ineffectiveness in improving food safety in leafy produce. This part notes that the advantages of the LGMA are that it presents a low-cost, quick, and seemingly cooperative method between industry and government to improve food safety in the short term, and that it has achieved widespread participation by individual growers and processors. However, these benefits are offset by mostly prospective deficiencies in the terms of the Agreement which 1) actually make the effort more industry-driven than cooperative, 2) vest standard-making power disparately with larger firms, ignoring consideration of the ability of smaller, less economically capable farms to comply with guidelines, 3) do not bind participants to stay in the Agreement and 4) do not provide sufficiently severe penalties for non-compliance.

Finally, mindful of Part V's analysis, Part VI will propose solutions for improving leafy produce food safety in the future. This paper concludes that while the LGMA presents several concerns in its overall ability to improve food safety, the Agreement can address these deficiencies by slightly tweaking its structure and terms, while

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23. *See* CAL. DEP'T OF FOOD AND AGRIC., CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2008-09 (2003), *available at* www.cdfa.ca.gov/statistics/files/CDFA_Sec1.pdf (noting that 75% of the nation's leafy green produce is grown in California).

24. For further reading of the responses and rhetoric of state and industry actors in the formation of the LGMA, *see generally* Kohnke, *supra* note 10 (providing a detailed account of the political and legislative tussles to advance a particular regulatory scheme).

still retaining its low-cost advantages. Thus, a modified LGMA may be a viable type of regulatory scheme effective in enhancing food safety not merely for leafy produce, but in many other agricultural industries.

II. VOLUNTARY REGULATIONS IN LEAFY PRODUCE

A. Background of Production Directives

Historically, the leafy produce industry has been essentially a self-regulated industry.[25] Not one mandatory regulation (regulation with which compliance is compulsory) had been imposed specifically on growers.[26] Instead, the primary "regulations" to control microbial contamination of produce have come in the form of voluntary guidance documents.[27] These documents, usually compiled by producer associations and interest groups, detail minimum quality control guidelines, known as Good Agricultural Practices (GAPs).[28] For instance, guidance documents released in California by Western Growers Association (WGA) and the International Fresh-Cut Produce Association (IFPA) set guidelines on the production of leafy green crops, providing suggestions for proper irrigation and soil

25. *See, e.g.*, Testimony of Caroline Smith DeWaal, Director of Food Safety for the Center for Science in the Public Interest Before the House Committee on Oversight and Government Reform, July 29, 2009, *available at* http://cspinet.org/new/pdf /house_govt_oversight_-_leafy_green_testimony_-_july_09.pdf (noting that "domestic produce [emphasizing leafy produce] is largely unregulated"). *See also* Marian Burros, *E. Coli Fears Inspire a Call for Oversight*, N.Y. Times, Dec. 9, 2006, http://www.nytimes.com/2006/12/09/nyregion/09produce.html?ex=1323320400&en=f6e8c8dcb68ba228&ei=5088&partner=rssnyt&emc=rss (noting that prior to the outbreak, governmental regulation did not exist within the leafy produce industry). *But see* CAL. DEP'T OF PUB. HEALTH: FOOD AND DRUG BRANCH, FACILITY INSPECTIONS, *available at* http://www.cdph.ca.gov/pubsforms/Guidelines/Documents/fdb%20Facil%20Inspect.pdf (noting that California imposes mandatory facility inspections for food processors, enforcing regulations contained in Good Manufacturing Practice (GMP) documents).

26. *See* Kohnke, *supra* note 10, at 502 ("growers, processors, and shippers of fresh produce have successfully avoided food safety regulations on both the state and federal levels").

27. *See FDA Actions Regarding Produce Safety*, PRODUCE SAFETY PROJECT, http://www.producesafetyproject.org/admin/fact_sheets/files/0006.pdf (last visited Nov. 12, 2010).

28. *See id.*; *see also* NAT'L WATERMELON ASS'N, VOLUNTARY FOOD SAFETY GUIDELINES FOR THE WATERMELON INDUSTRY: FINAL DRAFT 1-3 (2000), *available at* http://www.nationalwatermelonassociation.com/Voluntary%20Food%20Safety%20Guidelines%20for%20Watermelon.pdf.

amendment practices, harvesting techniques, and handling procedures.[29] Because most leafy produce is grown in California, federal agencies such as the Food and Drug Administration often examined these regional industry-created documents with a degree of deference, incorporating them into its own guidance documents for producers across the country.[30]

In terms of comprehensiveness, guidance documents are successful at covering all relevant stages of the production process, and in suggesting techniques that are scientifically effective methods to curtail pathogen contamination.[31] However, the greatest flaw of guidance documents is suggested within its name: these documents are merely advisory and have no mandatory regulatory force. In

29. *See, e.g.* INT'L FRESH-CUT PRODUCE ASS'N ET AL., COMMODITY SPECIFIC FOOD SAFETY GUIDELINES FOR THE LETTUCE AND LEAFY GREENS SUPPLY CHAIN (1st ed. 2006), *available at* http://www.fda.gov/downloads/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/GuidanceComplianceRegulatoryInformation/UCM169008.pdf [hereinafter IFPA GUIDELINES]. Guidance document GAP guidelines are usually separated into three categories. First, Production and Harvesting Unit Operation guidelines suggest minimum standards of irrigation water quality, soil and soil amendment quality, irrigation practices, and harvesting machine quality. Examples of such guidelines are procedures for maintaining an isolated clean water supply for irrigation (such as use of a water supply which is fumigated or solarized before used for irrigation), or the appropriate type of irrigation method (such as dripping versus overhead sprinkling) based on the type of crop and the environmental setting of the facility. Other guidelines set standards for soil suitability, such as proper composting procedures to minimize the risk of pathogen survival. The second category of guidelines, Postharvest Unit Operations, suggest standards during the postharvest cooling of produce. Cooling apparatuses may become contaminated if contact is made with tainted produce, soil, water, or hands. These guidelines reiterate many Production and Harvesting guidelines, and suggest further handling techniques. The third category of guidelines, Value Added and Distribution Unit Operations, suggest standards for distribution preparation, transportation, and in-house final processing of produce. *Id.* A final global category of operations suggested general, year-round practices to avoid crop contamination, such as strategic placement of toilet facilities away from growing areas, or baseline hand-washing procedures. *See* FOOD AND DRUG ADMINISTRATION, GUIDE TO MINIMIZE MICROBIAL FOOD SAFETY HAZARDS FOR FRESH FRUITS AND VEGETABLES (1998), *available at* http://www.fda.gov/downloads/Food/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf [hereinafter FDA GUIDE].

30. *Compare* IFPA GUIDELINES, *supra* note 29, *with* FDA GUIDE, *supra* note 29.

31. *See* Eschenbach Testimony, *supra* note 10 ("After enlisting the help of the scientific community and the industry, FDA published the 'Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables.' This guide..recommends good agricultural practices and good manufacturing practices that growers, packers, and shippers can take to address common risk factors in their operations. We have worked with the domestic and foreign fresh produce industry since the release of this Guide to promote its recommendations and to advance the scientific knowledge to enhance the safety of fresh produce").

other words, producer compliance with these comprehensive guidelines had been entirely voluntary. No penalty was imposed on growers for non-compliance with the guidance documents, nor was there any immediate framework for state or federal agencies to implement fines or other enforcement mechanisms.[32] Because guidance documents served as the plenary force for shaping agricultural practices in leafy produce, producers did not face any mandatory regulations before 2006.

B. Comparison of Leafy Produce Regulations with Other Industries

Compared to leafy (and generally, fresh) produce, other agricultural industries have faced far more mandatory directives. For instance, legislation such as the Meat Inspection Act removed a previously voluntary inspection program, and required federal employees to certify the safety of each meat product sold in interstate commerce.[33] By the 1980s, the USDA's Food Safety and Inspection Service began to implement Hazard Analysis and Critical Control Point (HACCP) regulations in addition to visual inspections.[34] While

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32. *See supra* note 25.

33. *Supra* note 6; Regulation of the meat industry has been expanded by amendment to the original Act. *See* Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967); *see also* Kohnke, *supra* note 10, at 502 ("Unlike beef, poultry or seafood, which have been subject to firm mandatory federal government controls since the early 1990s, growers, processors, and shippers of fresh produce have successfully avoided food safety regulations on both the state and federal levels.").

34. HACCP regulations have existed since the 1950s, but did not enjoy widespread recognition until later. HACCP programs are typically supported by scholars in that they represent a second preventative dimension to improving food safety by eliminating contamination before it is manifested in food products. As one food safety official put it, "it is easier to keep all needles out of the barn than to find the needle in the haystack." Neal Fortin, *The Hang-Up With HACCP: The Resistance to Translating Science Into Food Safety Law*, 58 FOOD & DRUG L.J. 565 (2003); *see*, e.g., Margie Russell, *HACCP: What's the Hang-Up* Food Engineering, Dec. 1995, at 48; *see also* FOOD AND DRUG ADMINISTRATION, FOOD CODE 530-531 (2009) (noting that HACCP regulations are useful in that they are "the most effective and efficient way to ensure that food products are safe."). While few argue against the principle of HACCP regulations, there are practical limits to its success. As the process of creating HACCP regulations is primarily a science-driven, risk-assessment approach, there are bound to be limits to the extent of scientific knowledge available on even the most consumed items, much less in smaller agricultural commodities. Usually the first scientific inquiry is the source and mechanism of contamination (often referred to hazard and risk assessment). A secondary inquiry is identifying which procedures are effective at eliminating these risks (known as critical control points). A final scientific inquiry is a determination tolerable limits of the critical control points (known as critical limits), such as minimum heating times, maximum non-

inspections constitute a "command-and-control" type of regulation (temporarily shifting responsibility for certifying the product's safety to the inspector), HACCP regulations are a type of process control mechanism, restoring responsibility for pathogen reduction and control to the producer. Thus, meat, poultry, and other producers are subject to both *current-acting, product-point* regulations, such as inspection, and *proactive, pre-production* regulations, such as process control rules, to prevent safety crises before they are found in the product.

Before 2006, leafy producers were primarily subjected to the latter type of regulation.[35] Product-point regulations are simply impractical for implementation in the leafy produce context. No agency or even producer can be reasonably expected to inspect every leaf of its crops for impurity or pathogenic contamination. On the other hand, the GAPs contained in guidance documents typically indicate practices which specify preventative measures to avoid contamination prior to cultivation.[36] But, as noted before, the key indicator of regulatory exceptionalism[37] in leafy produce was the

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refrigeration exposure time, etc. Beyond these scientific inquiries, a number of administrative procedures must further be established, specifying a method of enforcement, a schedule of corrective action, and a system of verification. *See id.* at 505. Thus, most critiques of HACCP regulations usually point to gaps or lapses in scientific data, which compromise the effectiveness of HACCP regulations and allow for outbreaks. Very few scholars, however, criticize the mandatory nature of HACCP guidelines (that compliance is required). This critique is usually reserved for industry officials, who most usually cite cost concerns. *See, e.g.*, Fortin, *supra.*

35. Although guidance documents are not HACCP regulations in practice (as they are not mandatory), in theory, they similarly specify prospective steps to avoid contamination before the end-product stage. *See, e.g. supra* note 17. However, even with this theoretical similarity between formal HACCP regulations and GAPs of guidance documents, some have expressed that inherent differences between produce industries and other commodities make GAP frameworks different. For instance, the site of cultivation of produce usually occurs in an outdoors setting, as opposed to meat slaughtering, processing, and most other agricultural industries. *Id.* It is often conceded that raw products, which constitutes all produce, will contain some bacteria even if GAP guidelines are closely followed. Thus, it may be that GAP guidelines allow more tolerance in terms of possible contamination, and even more, it is perhaps more difficult to determine the independent effectiveness of GAP standards as compared to official HACCP regulations. *See* Caroline Smith DeWaal, *Delivering on HACCP's Promise to Improve Food Safety: A Comparison of Three HACCP Regulations*, 52 Food Drug L.J. 331 (1997), noting the special difficulties of assessing raw products.

36. *See* Eschenbach Testimony, *supra* note 10.

37. This is the critical distinction between leafy (and generally all) produce and most other industries, and is why I do not technically refer to GAPs in guidance

lack of mandatory obligations imposed on growers. The HACCP-like guidance documents simply could not force compliance or threaten sanctions upon producers.

C. Sources of Leafy Produce Regulatory Exceptionalism

There are several possible explanations to account for the historical non-regulation of produce as compared to other industries. On the one hand, before the 2006 outbreak, crops such as lettuce and spinach were not viewed as high-risk foods.[38] While the source of the public's historical trust of produce is uncertain, it most likely stems from the lack of a widespread, well-publicized recall (as seen in the meat industry), the lack of history of sensational accounts of the fresh produce industry (such as an equivalent of *The Jungle*), and the inherently differential nature between meat, coming from an animal, and produce.[39]

Unfortunately, the public's trust of the produce industry is not consistent with industry's food safety track record. Compliance with the GAPs contained in guidance documents was usually poor, with large portions of small and midsized production firms even reporting unawareness of general guidelines.[40] These low rates of compliance under a voluntary regulatory framework were reflected in the number of foodborne illnesses attributed to produce - specifically leafy produce. Between 1990 and 2003, a majority of foodborne

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documents as HACCP regulations - they are not *regulations*, but merely *suggestions*. *See supra* notes 26-27, 31.

38. Chryssa V. Deliganis, *Death by Apple Juice: The Problem of Foodborne Illness, the Regulatory Response and Further Suggestions for Reform*, 53 FOOD & DRUG L.J. 681, 688 (1998); Kohnke, *supra* note 10, at 498.

39. Evidence of consumers' differential attitudes between produce and, for instance, meat may be reflected in the preparation methods often used. Consumers are far more likely to eat produce, especially leafy produce (such as packaged salads) without cooking or even washing the product as compared to meat. *See, e.g.*, *Food Safety: Current Challenges and New Ideas to Safeguard Consumers: Hearing Before the S. Comm. on Health, Education, and* Pensions, 109th Cong. 9 (2006) (statement of Robert Brackett, Director, Center for Food Safety and Applied Nutrition, FDA) [hereinafter Brackett Testimony].

40. *See* Center for Science in the Public Interest, *Re: Comments on Proposed Produce Safety Action Plan* (July 21, 2004), *available at* http://www.fda.gov/ohrms/dockets/dailys/04/july04/072904/04N-0258-emc00002-01.pdf (noting that while larger growers tend to adhere to GAP guidelines, GAP "compliance is far from universal," and that many producers were even unaware of or not complying with guidance documents. CSPI's comment detailed a study surveying New York farmers, finding that only 30% or growers were aware of GAPs for their particular crop).

illness outbreaks were attributed to contaminated produce, greater than the number of illnesses caused by contaminated beef and eggs combined.[41] Leafy produce is particularly implicated in food contamination occurrences.[42] Further, despite the increasing breadth of guidance documents in the 1990s, the number of leafy produce-caused outbreaks doubled from 1998 to 2004.[43] Another disturbing trend is the increasing magnitude of outbreaks caused by leafy produce.[44] Now, a single contaminated leaf may contaminate the leafy vegetable supplies of dozens of states.[45] In addition, the greater consumption of leafy produce by consumers increases the likelihood of foodborne illness from contamination.[46] Despite these trends in safety and in facility centralization prior to 2006, legislators and agencies remained reluctant to promulgate mandatory regulations.[47]

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41. Kohnke, *supra* note 10, at 499; Daniel Akst, *Big Farms Will Keep Spinach on the Table*, N.Y. TIMES, Oct. 15, 2006, http://www.nytimes.com/2006/10/15/business
/yourmoney/15cont.html?_r=1&scp=1&sq=%22big%20farms%20will%20keep%20spinach%22&st=cse.

42. *See* Linda Calvin, *Outbreak Linked to Spinach Forces Reassessment of Food Safety Practice*, AMBER WAVES, June 2007, *available at* http://www.ers.usda.gov/AmberWaves/June07/Features/Spinach.htm).

43. *See Behind CSPI's Outbreak Data: A Look at the Produce Outbreak Numbers*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, http://www.cspinet.org/foodsafety/produce_data.pdf (last visited Nov. 15, 2010).

44. *See* MARION NESTLE, SAFE FOOD: BACTERIA, BIOTECHNOLOGY, AND BIOTERRORISM 43 (2003).

45. Deliganis, *supra* note 38, at 696 ("When a contamination problem occurs at [a growing facility] a product may be distributed to thousands, or hundreds of thousands, of people before the danger is discovered."); Kohnke, *supra* note 10, at 500 ("In today's marketplace, where the majority of distribution is conducted by a few large scale processing plants that mix products from numerous farms, all it takes is a single contaminated leaf to spoil a massive multi-state supply of leafy greens.").

46. *See* Deliganis, *supra* note 38, at 698 (noting that produce eaten daily rose from an average of 3.9 servings during 1989-1991 to 4.4 servings between 1991 and 1994).

47. Kohnke, *supra* note 10, at 502 ("Unlike beef, poultry or seafood, which have been subject to firm mandatory federal government controls since the early 1990s, growers, processors, and shippers of fresh produce have successfully avoided food safety regulations on both the state and federal levels.").

III. THE 2006 E. COLI SPINACH OUTBREAK

On September 14, 2006 the Centers for Disease Control (CDC) alerted the nation of a widespread E. coli O157:H7 outbreak.[48] The CDC linked the outbreak to fresh spinach produce, but was not initially aware of the source.[49] In the ensuing weeks, hundreds of illnesses were reported across 26 states, with three fatalities.[50] After pathogen genetic trace-back investigations of several suspected farms, a single growing facility in the Salinas Valley[51] was implicated as the source of one of the largest and deadliest outbreaks of foodborne illness in recent years.[52] The land was part of a cattle ranch which was leased to a local spinach grower company.[53] A report by the FDA and the California Department of Health Services listed several possible environmental causes of contamination, including cross-contamination of irrigation reservoirs with nearby surface water, feral pigs in the fields, and deficiencies in the producer's post-harvest handling procedures.[54]

The outbreak dealt a severe blow to produce farmers across the nation. Nowhere was the impact more pronounced than in California, where dramatically slowed sales amounted to an estimated loss of nearly $100 million to producers.[55] Even though only a single crop was involved, significant adverse economic effects were felt by nearly every entity along the produce commodity chain, including

48. Press Release, Centers for Disease Control and Prevention, Multiple States Investigating a Large Outbreak of E. coli O157:H7 Infections (Sept. 14, 2006), *available at* http://www2a.cdc.gov/han/ArchiveSys/ViewMsgV.asp?AlertNum=00249.

49. Brackett Testimony, *supra* note 39, at 9.

50. *Update on Multi-State Outbreak of E. coli O157:H7 Infections From Fresh Spinach*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 6, 2006), http://www.cdc.gov/foodborne/ecolispinach/100606.htm.

51. The Salinas Valley, often called the "Salad Bowl of the World," is home to a heavy concentration of growers of leafy green vegetables, and accounts for the majority of leafy vegetable production in the United States. *See* Rong-Gong Lin II, *E. Coli Outbreaks Prompt Review of Salinas Valley Lettuce Farms*, L.A. TIMES (Sept. 11, 2006), http://www.marlerblog.com/ecolioutbreaks.pdf.

52. *Id.; see also* Jesse McKinley, *Farmers Vow New Procedures; Bacteria Eyed in Boy's Death*, N.Y. TIMES (Sept. 22, 2006), http://travel.nytimes.com/2006/09/22/us/22spinach.html?partner=rssnyt&emc=rss.

53. Brackett Testimony, *supra* note 39, at 12.

54. *Id.*

55. *See Spinach Farmers Try to Grow Public's Confidence*, MSNBC.COM (Oct. 2, 2006), http://www.msnbc.msn.com/id/15095551/.

supermarkets, restaurants, and fresh-cut processors.[56] Compounding the effects of the spinach E. coli outbreak, a second outbreak in the Northeast and Midwest involving contaminated lettuce[57] occurred less than two months later, further increasing consumer reluctance to purchase fresh produce. The seemingly limited scope of tainted produce thus led to widespread economic effects well beyond the spinach or lettuce growing industries.

IV. THE POST-OUTBREAK LEAFY PRODUCE REGULATORY LANDSCAPE

Following the 2006 crisis, many believed the incident would serve as a watershed moment in implementing mandatory regulations on the fresh produce industry.[58] However, federal agencies normally charged with implementing food safety measures, such as the FDA and USDA, continued to abstain from intervention.[59] Even more surprisingly, state legislators remained largely silent in setting new regulatory proposals on the table. A single California state senator proposed a two-tiered certification system, similar to the

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56. *See* Elisa Odabashian, *California Leafy Green Industry's Marketing Agreement Will not Ensure Nation's Salad Bowl is Safe*, CAL. PROGRESS REP. (July 25, 2007, 5:07 AM), http://www.californiaprogressreport.com/site?q=print/4146.

57. Press Release, Centers for Disease Control & Prevention, Multistate Outbreak of E. coli O157 Infections, November-December 2006 (Dec. 14, 2006), *available at* http://www2a.cdc.gov/HAN/ArchiveSys/ViewMsgV.asp?AlertNum=00256.

58. *See*, e.g., Marian Burros, *Who's Watching What We Eat?*, N.Y. TIMES (May 16, 2007), http://www.nytimes.com/2007/05/16/dining/16fda.html?_r=3&pagewanted=1&oref =slogin ("The cause [of food safety regulatory overhaul] gained momentum in the past year as at least three people died and more than a thousand were sickened by contaminated tomatoes, lettuce, peanut butter, and spinach..[The commissioner of the FDA] believes the agency can achieve its goals through voluntary guidelines. But the fresh-cut produce industry, hit hard by outbreaks in recent years, has been virtually begging for stronger intervention."); *Growers Pursue Safety Program for Leafy Green Vegetables After E. coli Scares*, USA TODAY (Jan. 25, 2007, 11:25 PM), http://www.usatoday.com/money/industries/food/2007-01-25-safety-program_x.htm ("Growers, packers and shippers of leafy green vegetables, still reeling from the impact of devastating E. coli outbreaks, moved this week to create voluntary food-safety standards..[T]he United Fresh Produce Association announced that to regain customer confidence, the industry needs national, mandatory produce-safety standards overseen by the federal government.").

59. Kohnke, *supra* note 10, at 505 ("With [a] strong record of federal government involvement in the regulation of food safety, the lethal multi-state outbreaks of *E. coli*..in 2006 linked to California-grown spinach and lettuce provided officials with yet another opportunity to flex their regulatory muscles. However, no such flexion ever occurred.").

regulations found in the meat industry.[60] Leafy producers quickly assembled opposition, suggesting a competing proposal which would ultimately prevail.

A. A Traditional Response: The State-Regulation Proposal

Following the 2006 outbreak, legislative calls for reform were limited to a single proposal by California State Senator Dean Florez.[61] A vocal proponent of direct governmental involvement in regulating produce, Senator Florez introduced the "California Produce Safety Action Plan" in the state legislature.[62] While the Plan ultimately was defeated, it is nonetheless worth detailing because of its utility in providing baseline regulatory solutions when assessing the problems of the industry-driven plan adopted instead, and its clean summary of the line of governmental regulation arguments typically made by consumer advocate organizations.

Senator Florez's Plan consisted of three food safety bills seeking to charge the California Department of Health Services (CDHS)[63] with inspection and certification duties. The first bill, S.B. 200, authorized the CDHS to "adopt recall, quarantine, and sanitary regulations necessary to *prevent*, circumscribe, or *eliminate* any condition where any produce or food processed from produce may carry..a pathogen" (emphasis added, indicating both proactive and current-acting regulations).[64] Most significantly, S.B. 200 required the CDHS director to "establish and administer a leafy green vegetable inspection program," and enabled the CDHS to impose civil penalties for non-compliance with departmental regulations.[65]

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60. *Id.* ("[T]he only serious legislative proposal to materialize in the aftermath of [the] crisis came from Senator Florez, who firmly believed that a government-regulated solution was the only appropriate response.").

61. (D-Shafter). Florez is the Chair of the California Senate Select Committee on Foodborne Illness.

62. Frank D. Russo, *Package of Major Food Safety Bills Introduced by California State Senator Dean Florez*, CAL. PROGRESS REP. (Feb. 1, 2007, 7:41 AM), http://www.californiaprogressreport.com/site/?q=print/4963.

63. The CDHS has recently been reorganized into two separate entities. The most relevant agency today for purposes of food safety in California is the state Department of Public Health.

64. *See* S.B. 200, 2007 Sess. (Cal. 2007) (emphasis added to indicate both proactive and current-acting regulations).

65. *Id.* In addition, inspectors would be appointed by the CDHS Director, and would review a facility's agricultural practices as well as conduct periodic tests on water, soil, and produce quality. *Id.*

The Plan's second bill, S.B. 201, prohibited producers from engaging in specific production practices, essentially making previously-existing GAPs mandatory.[66] Further, the bill increased punishment of non-compliance by allowing for imposition of criminal sanctions.[67]

The Plan's final bill, S.B. 202, proposed a revamped facility organization system to assist in regulatory enforcement and post-outbreak trace-backs.[68] Specifically, the bill required growers to implement a coded lot numbering system, and to assign each product produced from a specific lot the corresponding lot number.

As mentioned above, none of the Plan's components passed, running into opposition from Governor Arnold Schwarzenegger.[69] Instead, the leafy produce industry was left to craft a food safety regulatory proposal.

B. Redefining the Top-Down Regulatory State: The Industry's Response

Western Growers Association (WGA), one of the largest and most influential agricultural trade associations on the West Coast,[70] proposed a marketing agreement plan to compel producers to adopt GAPs and improve food safety.[71] Marketing agreements are

66. *See* S.B. 201, 2007 Sess. (Cal. 2007). Examples of restricted practices included using surface water in irrigation, allowing cross-contamination of irrigation water supply with surface water, using improperly composted manure as fertilizer, maintaining toilet facilities in or adjacent to growing fields, or using irrigation water exceeding acceptable pathogen levels. The CDHS would also be required to develop model checklists to help producers comply with the bill's provisions.

67. *Id.*

68. *See* S.B. 202, 2007 Sess. (Cal. 2007).

69. Approximately a month after its introduction, a spokeswoman for Governor Arnold Schwarzenegger stated that the Governor preferred an "industry-regulated solution," and GOP state senator Abel Maldonado said through a spokeswoman that because industry actors "have a very vested interest in ensuring [product safety]," self-policing was a reasonable solution. Marla Cone, *Gov.'s Stance an Obstacle for Spinach Safety Bills*, L.A. TIMES (Mar. 1, 2007), http://articles.latimes.com/2007/mar/01/local/me-spinach1. Some of the bills did enjoy legislative success – S.B. 200 initially passed in the senate, but was re-referred to the State Senate Committee on Agriculture, where it died; S.B. 201 managed to pass in the state assembly and senate, only to be vetoed by Governor Schwarzenegger. Insufficient support to overturn the veto marked the end of S.B. 201's run.

70. Western Growers represents over 90% of all fresh produce growers in California and Arizona, consisting of over 3,000 members. *Who We Are*, WESTERN GROWERS ASS'N, http://www.wga.com/default.php?id=153&pagename=WhoWeAre (last visited Nov. 15, 2010).

71. CAL. DEP'T OF FOOD AND AGRIC., CALIFORNIA LEAFY GREEN PRODUCTS HANDLER MARKETING AGREEMENT (Mar. 5, 2007), *available at*

voluntary programs that ensure products sold under the agreement comply with particular predetermined regulations.[72] Membership under an agreement, however, is not compulsory. Thus, producers face no concrete regulation or enforcement threat from such agreements; rather, the largest threats are imposed by consumers' perception of a non-participating product's inferiority in the marketplace.[73]

WGA's plan proposed the formation the Leafy Greens Marketing Agreement (LGMA) between the California Department of Food and Agriculture (CDFA) and leafy produce "handlers" – defined as any entity (except retail establishments) that "handles, processes, ships, or distributes" leafy produce.[74] Under the LGMA, the CDFA would be charged with determining whether growers and handlers

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http://www.caleafygreens.ca.gov/members/documents/LGMAmarketingagreement03.08_000.pdf [hereinafter LGMA].

72. *See* G.B. Wood, *Marketing Agreements and Orders - Without Production Controls*, 1961 INCREASING UNDERSTANDING OF PUB. PROBS. & POL'Y 69, *available at* http://ageconsearch.umn.edu/bitstream/17627/1/ar610069.pdf.

73. Marketing agreements tap into consumer demand to impose a force of market-driven coercion to join the agreement. *See* Linda Calvin, *Outbreak Linked to Spinach Forces Reassessment of Food Safety Practices*, AMBER WAVES, June 2007, *available at* http://www.ers.usda.gov/AmberWaves/June07/Features/Spinach.htm ("To protect its competitive position and to minimize the risk of outbreaks elsewhere that would further shake consumer confidence in leafy greens, the California industry is considering whether to pursue a Federal marketing agreement or order that would cover the entire U.S. leafy green industry."); Henrich Brunke et al., Industry-Mandated Testing to Improve Food Safety: the New US Marketing Order for Pistachios (Aug. 20, 2004) (draft), *available at* http://aic.ucdavis.edu/research1/GermanPistachiosOnlineDraft10-25-04.pdf ("The marketing order is intended to reduce the odds of an [outbreak], mitigate the consequences if an event should occur, provide some quality assurance to buyers, and offset the negative consequences of concerns over the potential for a food scare..."); Hank Giclas, Vice President, Western Growers Association, Presentation to the National Restaurant Assocuation: CA Leafy Greens Marketing Agreement & Marketing Order, *available at* http://www.restaurant.org/pdfs/events/foodsafety/200703producesafety/giclas.pdf ("To restore and enhance the confidence of consumers, regulators buyers and other interested parties a mandatory program that will help ensure 100% of the industry complying with 'best practices' 100% of the time is necessary."); Press Release, Dean Florez, Florez Will Introduce Legislation to Enhance Training, Monitoring and Enforcement (Dec. 15, 2006), *available at* http://dist16.casen.govoffice.com/index.asp?TypeB_PR&SEC={5E36B143-3FBF-4945-AD03-0BAE9ED9CB67}&DE={740286F9-88EE-48B3-A80D-12F0562AB04E} ("The industry contends that consumer demand for certified produce would force growers to participate in the program to remain competitive.").

74. LGMA, *supra* note 71, at Article II, Section A(6).

operated in compliance with GAPs.[75] These GAPs, however, would be largely industry-driven as opposed to promulgated by the CDFA itself.[76] Handlers signing on to the LGMA are prohibited from purchasing produce from growers found to operate in violation of GAPs, or not subject to periodic inspection by the CDFA.[77]

Handlers abiding by the LGMA could, in turn, display a seal of approval, certifying membership in the Agreement and that the produce was a product of optimal practices.[78] Further, the terms of the agreement focused on entities closer to the end-consumer along the commodity chain.[79] In essence, the LGMA called upon a *state*

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75. *Id.* at Article V, Section C(1)(a) (stating that growers are "subject to periodic inspection by..state agricultural regulatory agency").

76. While the CDFA must approve any regulations suggested by the Leafy Greens Advisory Board, the Board may recommend GAP rules and also is the primary information-gathering entity under the Agreement. *See id.* at Article III, Section D.

77. *Id.* at Article V, Section C(2)(a). Additionally, handlers are required to follow special GAPs in transport and processing.

78. The seal of approval is referred to as a "certification mark." *See id.* at Article V. Under the terms of the LGMA, sanctions on handler non-compliance amount to suspension or revocation of the right to display or market such certification. A handler's first "flagrant or repeated violation" results in a suspension of the privilege to display a certification seal for two weeks. One of three criteria must be met in order to constitute such a violation: 1) the handler "knew the product was. . . produced in violation of handler or grower best management practices, and chose to [purchase] regardless"; 2) the handler had received prior best management practice (GAP) violation notices of the same type previously; 3) the handler received prior violations regarding record-keeping requirements. A second flagrant or repeated violation results in an indefinite suspension of the privilege to display certification, until the handler establishes a "Corrective Action Plan" (CAP). A flagrant or repeated violation occurring after the filing of a CAP results in a two year suspension of certification privilege, unless the handler "demonstrates a significant change in management and brand." Disputes over imposed sanctions proceed via informal hearing before an independent arbiter whose decisions are "final." *Id.* at Article V, Section D; *see also* CAL. LEAFY GREEN PRODUCTS HANDLER MKTG. AGREEMENT, ANNUAL REPORT 2007-2008 6 (2008), *available at* http://lgma.mjrcgdev.com/sites/default/files/07.08_Annual_Report.pdf [hereinafter ANNUAL REPORT].

79. Placing the certification process at the "handler" level, as opposed to merely growers, is a highly strategic attribute of the LGMA. Since marketing agreements must rely upon consumer demand to give value to a certification mark (otherwise, certification is nothing but a "pat on the back"), that demand is most cognizable in firms situated higher in the commodity chain, such as grocers, distributors, processors, and general retail establishments. *See generally supra* note 73. *But see Fresh Express Declines to Sign California Marketing Agreement*, PERISHABLE PUNDIT (Feb. 14, 2007), http://www.perishablepundit.com/index.php?date=02/14/07&pundit=1 (describing the refusal of a large leafy vegetable grower to enter the LGMA on the ground that the seal of certification strategy may "give consumers a false sense of

agency to enforce *privately* promulgated rules within a, at best, quasi-private mass contractual agreement.

Soon after the LGMA was proposed, the CDFA accepted the terms of the Agreement.[80] Within six months of enactment, 51 handlers, constituting over 99 percent of leafy produce crops grown in California, had entered into the LGMA.[81] Thus, it appears that the industry's proposal soundly defeated calls for a more traditional governmental regulatory response. Indeed, the LGMA is often seen as a model of food safety reform even at the federal level, as some have proposed the incorporation of a National Leafy Greens Marketing Agreement.[82] Because of the rapidly growing popularity of LGMA-style arrangements, analysis of marketing agreements is particularly critical from a food safety policy standpoint.

V. CRITICAL ASSESSMENT OF THE LGMA

In this section, I provide two general categories of criticism of the LGMA. The first line of criticism contends that the authoritative body responsible for setting GAPs is not subjected to sufficient oversight or even equal participation by the agency it purports to cooperate with. As a result, the promulgation of less effective or non-effective regulations may occur. The second general criticism is that even if GAP regulations are independently effective, there is no guarantee that they will continue to be followed down the road, or even that they will be followed now.

With the exception of the very last argument, all of these critiques point to structural deficiencies in the Agreement that raise prospective concerns. The fact that most of these consequences are only possibilities suggests that these current issues with the LGMA are relatively quick-fixes, correctable with simple modifications of the Agreement terms. On the other hand, the LGMA is blessed with two key strengths - thriftiness and speed. Thus, it seems that while the LGMA indeed contains flaws, some of which are capable of producing dire consequences, the easily correctable nature of

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security and that both the press and consumers could misinterpret what the seal stands for").

80. *See* Press Release, Cal. Dep't of Food and Agric., Leafy Greens Marketing Agreement Sets Compliance Audit Start Date, *available at* http://www.cdfa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=07-054 (last visited June 21, 2010).

81. *See* Cone, *supra* note 69; Kohnke, *supra* note 10, at 510.

82. *See supra* note 19.

these flaws and the pre-existing virtues of the Agreement make it worth keeping as a tool for improving food safety in leafy produce.

A. Are the Agricultural Standards (GAPs) Under the Industry Approach Effective in Improving Food Safety?

Recall the two historical characteristics of the leafy produce industry: (1) it has not been subjected to onerous top-down mandatory regulations,[83] and (2) its food safety track record has been relatively poor.[84] Based on these two characteristics, a glaring question in the LGMA's GAP rulemaking process is whether an industry-driven approach can be trusted to create *effective* (i.e. both scientifically effective and reasonably practicable) GAPs.[85]

To answer this question, it is necessary to first gauge just how *industry-driven* the authoritative body charged with creating rules is. Within the LGMA, member handlers and their producers are required to abide by GAPs promulgated through a centralized process. Under the Agreement, the Leafy Greens Advisory Board (LGAB) releases official notice of accepted GAPs to growers and handlers.[86] This rulemaking process differs substantially from that in other agricultural industries, where required rules of Best Practices are formed through traditional governmental rulemaking processes, including Notice and Comment periods, and are subjected to minimum procedural and decision-making requirements,[87] such as those

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83. *See supra* notes 25-27.

84. *See supra* notes 40-42.

85. Many have cited these characteristics to answer this inquiry in the negative. *See, e.g.*, Kohnke, *supra* note 10, at 512-513 (describing the responses by Senator Florez and other consumer advocacy groups, arguing that "it was unacceptable for the creation of GAPs to be left to the same industry that had caused twenty-two food-borne illness outbreaks since 1995" and that the "self-regulatory approach [was] nothing more than the 'fox [guarding] the henhouse'").

86. *See* LGMA, *supra* note 71, at Article III, Section D.

87. *See, e.g.*, Joseph M. Pocius, *The Truth and Consequence of "Standards of Identity,"* 52 FOOD & DRUG L.J. 337, 337 (1997) (describing proposed rulemaking action by the USDA's Food Safety and Inspection Service recommendations of acceptable meat and poultry contents revealed through inspection); *See generally* Denis Stearns, *Preempting Food Safety: An Examination of USDA Rulemaking and Its E. coli 0157:H7 Policy in Light of* Estate of Kriefall ex rel Kriefall v. Excel Corporation, 1 J. FOOD L. & POL'Y 375 (2005) (discussing USDA proposed rulemaking to characterize meat products contaminated with E. coli bacteria as adulterated and to implement a testing program); Margaret Glavin, *Update on FSIS Initiatives*, 53 FOOD & DRUG L.J. 337, 338 (1998) (describing FSIS proposed rulemaking "that focuses on egg safety during production, packing, processing, labeling, distribution, retail, and preparation - and seeks a rational, comprehensive, and cost-effective approach").

contained in the Administrative Procedure Act.[88] Simply put, the Board is not subjected to an APA equivalent, and may unilaterally promulgate new GAPs without any consideration of data or input from industry or public entities. Further, the terms of the Agreement specify that the Board must consist of between seven and thirteen signatory handlers.[89] In contrast, only one board member may represent the CDFA on behalf of the general public.[90] Therefore, the Board is numerically dominated by industry personnel.

The structure and enhanced rulemaking functions of the LGAB create three prospective consequences. First, this setup severely detracts from the "new governance" advantages to which LGMA proponents point by inhibiting mutual sharing of knowledge and data between industry and government, and by eliminating meaningful agency review of industry practices. Second, it provides no assurance that newly promulgated GAPs will be economically feasible for smaller farms, which historically have struggled to comply with GAPs. Taken to the extreme, the Board's lack of concern of practicability may create the potential for market abuse and hegemony of larger producers and handlers. Finally, specific GAPs, while scientifically supported in promoting food safety, may also contribute to several adverse environmental effects, ranging from erosion promotion to biodiversity concerns. Although this critique is not particularly a food safety concern, it is nonetheless a negative consequence of the LGMA worth briefly exploring to examine if food safety policy and environmental protection can coexist within the terms of the LGMA. These effects will be explored in the following paragraphs.

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88. *See, e.g.*, DeWaal Testimony, *supra* note 25, at 4 (noting the FDA's rulemaking authority under the Food, Drug, and Cosmetic Act, which has not been exercised in the area of fresh produce food safety); *see also* Cindy Skrzycki, *Cattlemen Have Beef With USDA Signals on Canadian Imports*, WASHINGTON POST (May 11, 2004), http://www.washingtonpost.com/ac2/wp-dyn/A16232-2004May10?language=printer (describing a dispute between ranchers and the USDA due to the agency's allowance of Canadian beef imports without following the normal notice and comment rulemaking requirements under the Act). The Act allows limited judicial review of agency decisionmaking, including whether actions were decided on arbitrary bases. *See* 5 U.S.C. § 706 (2006).

89. *See* LGMA, *supra* note 71, at Article III, Section A.

90. *Id.*

1. Regulatory Cooperation or Hegemony?

From its establishment, supporters of the LGMA hailed the Agreement as an unprecedented cooperative venture between government and industry.[91] Perhaps, on its surface, the LGMA appears as what "new governance"[92] proponents envision: a system of governmental "learning through monitoring" rather than mere enforcement, enhancing industry benchmarking and a free exchange of information, thus maximizing the quality of ideas and standards promulgated.[93]

But this argument both underestimates the importance of widespread public participation under a new governance scheme and overestimates the CDFA's role under the LGMA. As noted above, the LGAB is the authoritative rule-promulgating body under the Agreement. But the Agreement's terms permit the "veiled" promulgation of rules - there is no requirement for the Board to hold any sort of notice and comment period to collect data from either various industry actors or members of the public. Instead, the Board may unilaterally set GAP standards without traditional proce-

91. *See* Press Release, Western Growers Association, Western Growers Board Takes Action to Require Mandatory Food Safety Practices (Oct. 30, 2006), *available at* http://www.wga.com/public/active/siteBuilder/templateNewsReleasePopup.php?id=70.

92. The "New Governance" movement has become a trendy position in recent years. The basic premise of new governance theory is that traditional command-and-control model of state enforcement of its regulations suffers from both uncertainty in changing market landscapes and inefficiency at adapting to these changes. As a result, regulations become outdated and subject to both low levels of compliance and legitimacy of agency actions. *See* Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819 (2008) (book review). Instead, new governance proponents suggest a greater cooperative effort between agency and industry, implementing mechanisms for shared data collection and information gathering, mutual investments in industry-assisting technology, and the exchange of best practice benchmarks, leading to optimal public participation and maximization of efficiency. *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

93. Solomon, *supra* note 92, at 823 ("The kinds of regulation encompassed in the term *new governance* tend to be less prescriptive, less top-down, and more focused on learning through monitoring than compliance with fixed rule...[N]ew governance mechanisms share emphasis on regulation through 'centrally coordinated local problem solving.' Both in defining the problem to be addressed and devising solutions, new governance forms emphasize provisionality and revisability in light of experience. The public agency acts to help local actors learn from one another about best practices...").

dural or reviewing requirements.[94] Thus, the LGMA's enhancement of a Board's rule-setting power represents an even more centralized, top-down, and potentially arbitrary method of rule creation than under a typical agency regime.

An opposite indication may be gleaned from the LGMA's provision requiring Board decisions to be approved by the CDFA. Officially, the Secretary of Food and Agriculture's approval signifies that promulgated GAPs will be enforced via CDFA audits.[95] But all that is required to promulgate a new standard pending CDFA approval is the majority support of the Board.[96] While a rule pending agency approval may seem insignificant, in fact, the ability of the industry actors of the Board to advance GAP rules to the desk of the Secretary without an effort to gather or review data and public input inhibits meaningful agency oversight of the decisions of the Board.[97]

For example, assume that the Board wished to promulgate a GAP rule requiring installation of a newly invented water microbe meter in all water reserves. Also assume that the vast majority of

94. *See* LGMA, *supra* note 71, at Article III, Section F. No language in the LGMA terms suggests the sort of rulemaking procedures described at *supra* note 87.

95. *See id.* at Article III, Section D.

96. *See id.* at Article III, Section F(2).

97. New governance theory depends upon the ability of state agencies to both collect and distribute shared information to relevant industry entities. For instance, Grainne de Búrca has written extensively on the new governance experience in the European Union. The EU has adopted "Open Methods of Coordination" in several substantive areas, even including the establishment of fundamental rights. For instance, the EU Council adopted a directive to implement principles of equal treatment to member states, but left states to incorporate such policies in a patently new governance fashion - via "the monitoring of workplace practices, collective agreements, [and] research or exchange of experiences and good practices." Similar practices have been used for improving health care systems. The result was improvement of administrative efficiency and governmental enlightenment to improving benchmarking and oversight functions. Thus, state agencies actively sought data in order to monitor effectively, rather than hoping for data to seek them. Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 97, 99-101 (Gráinne de Búrca & Joanne Scott eds., 2006). This illustrates that viable cooperative efforts must still pit governmental agencies as the ultimate manager and distributor of data. The state's "monitoring" function (which the LGMA uses) relies upon collection of data to be able to assess the conduct it is overseeing. But the LGMA does not place agencies in a position to centrally dictate the terms of information collections. Not only does it subject agencies to a numerical minority within the body which initial creates rules, but *places the power of the purse with the industry-dominated Board. See* LGMA, *supra* note 71, at Article III, Section D(12) (granting the Board the function of disbursing funds to the CDFA). Thus, the agency is at the Board's mercy to facilitate information gathering sessions - a result thoroughly in conflict with the benefits of a new governance arrangement.

LGAB members voted in favor of the rule, but without holding an information-gathering session or without allowing public comment. Because of the majority vote, the rule advances to the Secretary for approval. But without any statistical data on the efficacy of the microbe meter, the Secretary cannot effectively challenge the suggestion of the Board.

The rate of CDFA approval of Board-proposed standards indicates such a trend of blind approval - the CDFA has yet to reject any action of the Board thus far.[98] Although this overlap could be chalked up to genuine concurrence between the two entities, the underlying systemic deficiency detailed above nonetheless provides a reasonable alternative explanation.

Thus, the strength in numbers of industry actors within the Board allows for the suppression of information gathering mechanisms, such as mandatory notice and comment periods, depriving both the agency representative of the Board and the Secretary of the resources necessary for dissent, and necessitating a practice of rubber-stamping by the "overseeing" agency.[99]

These characteristics make it more apparent that the Board structure of the LGMA is not as cooperative as it initially seemed. Yet, the lack of external, APA-like requirements in the LGAB's decision-making process may allow for the arbitrary exercise of the Board's top-down power to create rules, though not necessarily in line with the independent effectiveness of those rules adopted.

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98. *See* Sally Greenberg, Senior Counsel, Consumers Union, Comments to the FDA at the Public Meeting on Regulatory Options: Safety of Fresh Fruits and Vegetables (Apr. 13, 2007), *available at* http://www.consumersunion.org/pub/0413FDACommentsFreshProduce.pdf; Elisa Odabashian, Director, West Coast Office, Consumers Union, Comments to California Senate Select Committee on Food-Borne Illness at the Public Informational Hearing on the California Department of Food and Agriculture's California Leafy Green Marketing Agreement (Feb. 28, 2007), *available at* http://www.consumersunion.org/pub/2007/02/004283print.html (noting that the practice of the CDFA was to simply "take the advice of the industry on the best practices").

99. Such a concern is echoed by consumer watchdog organizations. *See, e.g.*, Odabashian, *supra* note 98 ("We are seriously concerned that the industry appears to intend to create its Best Practices standards behind closed doors, that it will be overseen by a Board made up almost exclusively of industry representatives, and that enforcement will amount to a simple rubber stamp by the California Department of Food and Agriculture (CDFA). Under state and federal law, standards are almost always put forward for Notice and Comment, so that the entire public has an opportunity to give input...This has the beneficial effect of getting input from a wide range of sources and experts, some of whom may have been previously unknown to the drafters of the standard.").

2. LGMA Board Structure and Practicability Concerns

Recall the definition of "effectiveness" provided above - that GAPs are scientifically effective and reasonably practicable. After all, even the most scientifically-supported GAP rules are ineffective at improving food safety when they are only economically implementable in a marginal number of facilities. The concern, then, is that inadequate representation of either a public agency or smaller farms on the Board reduces consideration of feasibility of compliance with GAPs imposed on (particularly smaller) growers and handlers, thereby compromising the overall effectiveness of GAPs in terms of practicability.

Skepticism of an approach charging a select group of large firms with the task of determining the economic abilities of smaller firms is justified. To see this, compare the GAP rulemaking process under the LGMA with the process in the pre-2006 fresh produce industry. As explained earlier, under the old framework, industry associations such as the WGA and the IFPA created and released guidance documents providing voluntary suggestions for improving agricultural practices.[100] State and federal agencies reviewed these documents with a healthy dose of deference and typically adopted the guidelines verbatim, without conducting independent information-gathering mechanisms.[101] The pre-2006 framework, therefore, was largely industry-driven. But under this old framework, rates of GAP compliance among small firms were both substantially less than large firms and relatively abysmal.[102] While several factors arguably may account for this disparity,[103] it nonetheless provides some baseline evidence that an industry-driven regime tends to cater to the

100. *See supra* note 29.

101. To see this, note the similarity between IFPA GUIDELINES, *supra* note 29, and FDA GUIDE, *supra* note 29.

102. *See* Center for Science in the Public Interest, *supra* note 40.

103. The lone premise of poor historical compliance rates generally concentrated among smaller farms does not necessarily mean that the GAPs promulgated under the pre-2006 framework were impracticable. For instance, smaller farms may have withheld GAP compliance in order to maximize profits and better compete with increasingly large firms. *But see* ELANOR STARMER, FOOD AND WATER WATCH, & MARIE KULICK, INST. FOR AGRIC. & TRADE POLICY, BRIDGING THE GAPS: STRATEGIES TO IMPROVE PRODUCE SAFETY, PRESERVE FARM DIVERSITY AND STRENGTHEN LOCAL FOOD SYSTEMS 5 (Sept. 2009), *available at* http://www.iatp.org/iatp/publications.cfm?accountID=258&refID=106746 (stating that a "weakness of the LGMA is that it cannot be easily adopted by small and mid-sized farms," and noting that small-farm voices were not considered until very late stages in the LGMA development process).

most influential (i.e. largest) firms, implementing rules (voluntary or not) which are clearly not universally attainable.

Under the LGMA, industry associations, now in the form of the LGAB, again dictate GAP promulgation and minimally leave the door open to marginal approval by the CDFA. In other words, the regulatory landscape has changed little. Without affirmative rules constraining the maximum and minimum number of Board members from large, midsized, and small firms, there will always be a theoretical possibility that the smaller firms will be unable to meet the demands of GAPs promulgated by a large firm-dominated Board.

Both empirical and qualitative evidence of impracticability is surfacing. A survey of a representative sample leafy produce farms[104] indicated that large farms[105] reported the lowest amount of food safety costs in response to compliance with the GAPs of the LGMA.[106] Small farms, on the other hand, reported substantially higher food safety costs per acre, including installation of fencing and irrigation renovation.[107] Further, larger farms reported a far higher rate of employment of food safety specialists to advise them on compliance with GAPs.[108] Small farms, however, reported a negligible rate of employing such specialists.[109] The report concluded

104. Shermain D. Hardesty & Yoko Kusunose, *Growers' Compliance Costs for the Leafy Greens Marketing Agreement and Other Food Safety Programs*, UC SMALL FARM PROGRAM RESEARCH BRIEF (Sept. 2009), *available at* http://www.sfc.ucdavis.edu/docs/leafygreens.pdf.

105. *Id.* The survey classified farms according to average annual revenue, but slightly altered the USDA definitions of "small" farms (under $250,000 annual revenue) by essentially creating five size designations – very small farms (under $250,000 annual revenue), small farms (between $250,000 and $500,000), mid-sized farms (between $500,000 and $1 million), large farms ($1 million to $10 million), and very large farms (over $10 million). Nearly 80% of farms represented in the survey were large or very large farms. In addition, the survey found that farm revenue closely correlated with farm acreage, and that most growers for LGMA handlers were fairly specialized in leafy produce (rather than cultivating multiple crops). *Id.*

106. *Id.* at 9-10. In 2007, very large farms reported an average of $33.22 seasonal food safety costs per acre, as compared to $38.57 for small and mid-sized farms. A more telling indicator of disparate effects of the LGMA, very large farms reported average modification costs (costs to comply with GAPs) of $8.29 per acre, as compared with $14.82 per acre for small and mid-sized farms.

107. *Id.*

108. *Id.* Very large farms reported food safety specialist costs four times higher than small and mid-sized farms. In 2006, small and mid-sized farms did not report any costs (indicating that few, if any, retained food safety specialists).

109. Shermain D. Hardesty & Yoko Kusunose, *Growers' Compliance Costs for the Leafy Greens Marketing Agreement and Other Food Safety Programs*, UC SMALL FARM

that smaller farms are particularly vulnerable because of an inability to pass these costs on to grocers and other handlers.[110] These statistics thus provide further evidence that the GAPs promulgated, while certainly comprehensive, are simply not practicable for all firms.

For more qualitative evidence of the possible infeasibility of GAPs promulgated by a Board dominated by large industry actors, consider the statements of critique filed by small farms. For instance, the Community Alliance with Family Farmers (CAFF) issued a Comment of opposition of the LGMA to the USDA, indicating that a lack of small-scale farm representation on the Board led to the creation of GAPs which are infeasible for small farmers and organic growers.[111] Instead, the CAFF urged a "more practical. . . approach to food safety that diverse, traditional farmers of all sizes could implement."[112] The position of small, family farm establishments provides a clear indication that the lack of diverse representation on the standard-promulgating Board amounts to the creation of impractical GAPs.

While a lack of representation of small firms within the LGAB may impede consideration of feasibility of GAP compliance by the smallest farms, the setup is also a recipe for rampant market abuse. If a select group of large firms decide to promulgate GAPs which impose prohibitive costs of compliance on smaller farms, these marginal establishments will effectively be forced out of the LGMA.[113] If consumer demand is sufficiently tied to safety concerns, the lack of

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PROGRAM RESEARCH BRIEF (Sept. 2009), *available at* http://www.sfc.ucdavis.edu/docs/leafygreens.pdf.

110. *Id.* at 11 ("It seems unlikely that growers have been able to obtain higher prices in order to cover part or all of their increased food safety compliance costs..the highly consolidated grocery sector often pays below perfectly competitive prices..Our results indicate that growers with revenues over $10 million benefit from significant economies of size in complying with the LGMA and other food safety provisions; therefore they have the greatest capacity to absorb these costs. Operations with sales between $1 million and $10 million appear to be the most vulnerable, but operations with sales under $1 million could also incur high compliance costs. Furthermore, the owners/managers of these small operations do not have the personnel–neither the food safety specialists nor the management teams–to whom they can delegate the effort of reviewing food safety regulations and completing administrative activities").

111. Community Alliance with Family Farmers, Comment on Proposed Federal Rules for Leafy Greens (Nov. 27, 2007), *available at* http://www.caff.org/policy/documents/ USDA_Comments_44.pdf.

112. *Id.*

113. *Id.* The Comment notes that under the LGMA, "food safety rules [are] controlled by..handlers and processors and will unnecessarily drive many..traditional leafy green growers out of the business."

LGMA certification could spell doom for smaller firms. Indeed small farms have repeatedly expressed this concern.[114] In other words, an authoritative Board composed solely of large firm representatives (as it is currently constituted) could engage in a tactic of "predatory standardizing," temporarily imposing overly-onerous GAP rules with the intent of driving smaller firms out of business.

LGMA supporters may counter on two grounds. First, they may argue that the composition of the Board is ultimately set by the CDFA, and thus, there is no default guarantee that the Board will only be comprised of large firm representatives. While the argument is theoretically correct (the Secretary of the CDFA must confirm Board appointments), it is particularly noteworthy that no representative of a small or mid-sized farm has ever been appointed to the LGAB.[115] Therefore, while placing the duties of Board appointment with an independent agency seems to be a procedurally independent method of filling the LGAB, the absence of concrete Board composition rules has created a strong *de facto* preference for large firm representatives.[116]

A second possible argument which could be made in defense of the LGMA is that concerns of future market abuse and impracticability of GAPs are purely speculative. The argument goes that the near universal participation rates of firms[117] indicates that the GAPs promulgated thus far have not been overly onerous, and that no market abuse has been observed. Again, the argument is theoretically correct. But reliance on a current snapshot of the LGMA, without any concern for future LGMA participation within the context of dynamic factors which play into an individual firm's decision on whether to remain in the LGMA, is misguided. Necessarily, an ideal strategy contains such a prospective viewpoint. As all firms (but especially small firms) seem to engage in some cost-benefit analysis weighing whether LGMA certification is worth the extra

114. *Id.*

115. *See id.*

116. I am hesitant to offer a mechanism explaining why large farm representatives have dominated the composition of the Board because there is, frankly, little discussion of the CDFA's appointment decisions available. Nonetheless, a possible account stems from the same rationale provided in the preceding section – because the Board is granted the ability to advance a decision directly to the Secretary without any consideration requirements. The agency is then left without the necessary time or information to effectively challenge the decision of the Board.

117. *See* Kohnke, *supra* note 10, at 510.

costs of GAP compliance,[118] concerns of practicability must arise when (1) the force of consumer demand can constantly change, and (2) the industry's history indicates a lack of attention to economic feasibility of suggested GAPs.[119] Thus, while LGMA proponents are correct in asserting that the pitfalls mentioned above are only *potential* issues, a strategy that eliminates even prospective problems should be pursued.

3. Environmental Concerns

A number of conservation and environmental advocacy groups have criticized the LGMA for fostering a farm environment that is too sterile, beyond what science seems to suggest as the necessary means to eliminate E. coli and other pathogenic contamination.[120] As a result, biodiversity and wildlife conservation efforts suffer at the hands of overreaching GAPs.

The primary tension between conservationists and LGMA proponents has been the imposition of "super metrics" – stringent standards attempting to rid farming areas of any wildlife.[121] As a

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118. *See generally* Hardesty & Kusunose, *supra* note 104 (indicating that it is unlikely growers are able to reflect the costs of compliance in the price of their crops, because the grocery sector typically pays below-market prices. Thus, large farms are most able to absorb compliance costs, whereas small farms are far more vulnerable. Further, reduced profit margin discourages smaller establishments from retaining food safety specialists, impairing their ability to comprehend guidelines or complete administrative activities.); *see also Conservation Concerns Regarding a Proposed National Leafy Green Marketing Agreement*, WILD FARM ALLIANCE, http://wildfarmalliance.org/Press%20Room/press_ room_ National_LGMA.htm (noting that compliance expenses will most likely be reflected in profit margin rather than market price, and that "not many farmers could make ends meet and comply with the LGMA at this rate").

119. The poor compliance rates of voluntary GAPs under the pre-LGMA regime among small farms, discussed at *supra* notes 40-41, illustrates inattention to attaining universal attainment of GAPs.

120. *See, e.g.*, WILD FARM ALLIANCE, *supra* note 118; Elly Hopper, *Of Mice and Men*, TERRAIN MAGAZINE, Spring 2009, *available at* http://ecologycenter.org/terrain/spring-2009/of-mice-and-men/; Len Richardson, *Sterile Farming Adds to Food Risk*, CALIFORNIA FARMER, Jan. 2009, *available at* http://magissues.farmprogress.com/CLF/CF01Jan09/clf012.pdf; *Growers Pushed Too Far in Efforts to Provide Safe Food*, RODALE INST., http://www.rodaleinstitute.org/20080619/n2 (last visited Sept. 19, 2010).

121. *See* WILD FARM ALLIANCE, *supra* note 118. It should be noted that the LGMA does not officially impose super metrics – usually, the most stringent wildlife-eliminating standards are imposed by handlers. Nonetheless, the LGMA affirms these standards by both misapplication of Agreement standards by CDFA auditors (*see supra* note 90) and by not imposing a cap on super metric stringency by inde-

result, farmers are compelled to tear down any potential habitats on or adjacent to farms, eliminating all natural vegetation and creating farms which have "carefully plowed, unplanted rows stretching straight for acres, framed by razed edges and ditches doused with herbicide."[122] Indeed, a survey of 181 growers found that nearly 50% had been instructed to discourage the presence of wildlife on or near farms, and that most complied.[123]

The effect has been the mass removal of all vegetation, including filter strips, hedgerows, grassy waterways, and windbreaks, creating large and empty buffer zones between farms and wildlife.[124] But most environmental agencies have recommended keeping native vegetation along farm boundaries, as it reduces erosion and improves water quality by acting as a filter or barrier to farm wastes.[125] Despite these benefits, the survey indicated that nearly all farmers nonetheless removed boundary vegetation to deter wild animals.[126]

The auditing of these GAPs also place organic farmers in a lose-lose situation. Under the USDA's National Organic Program,[127] participants must maintain or improve the natural resources of the operation, including soil, water, wetlands, and wildlife.[128] Some organic farmers have faced difficulties when undergoing LGMA audits due to non-compliance.[129] Yet, de-certification could spell disaster for such establishments due to the inability to sell organic crops to handlers.

Some organizations have even attacked the scientific effectiveness of GAPs and super metrics at improving food safety, claiming that the vegetation-eliminating practices make contamination more likely. For instance, vegetation is seen as a filter not only to prevent the outbound motion of excess farming substances, but also to pre-

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pendent handlers. Practically speaking, limiting the buying requirements of handlers is unfeasible due to the proprietary nature of such metrics.

122. *See* Hopper, *supra* note 120.

123. *Id.*

124. *Id.*

125. *Id.* (noting that hedgerows and filter strips can "catch irrigation runoff and help filter the water before it re-enters the ecosystem").

126. *Id.*

127. 7 C.F.R. § 205 (2010). The Program creates a certification program for growers wishing to call their products "organic." Under the Program, participants are subjected to various audits and record-keeping requirements.

128. *See* 7 C.F.R. § 205.200 (2010).

129. *See* WILD FARM ALLIANCE, *supra* note 118 ("Several organic farmers told WFA they have had to convince their CA LGMA auditors that habitat helped to ensure food safety.").

vent the inbound spread of waterborne pathogens through rain.[130] Others see vegetation as a barrier to pathogenic dust created by cattle areas.[131]

The fundamental question to be asked is whether there exists a polar tension between food safety and environmental interests. LGMA advocates usually contend that the presence of any wild animals near farms increases the risk of pathogenic transmission.[132] In other words, it is argued that destruction of natural surrounding habitats is a necessary evil. On the other hand, while some conservationists dispute this claim,[133] there are distinctly few efforts made by environmental advocates to reconcile these seemingly opposing interests. For now, it seems that the relationship between food safety and conservation is all but a zero-sum game.

B. Does the LGMA Go Far Enough to Compel Compliance of GAPs?

Even assuming that the agricultural standards promulgated by industry forces are (and will continue to be) independently effective at improving food safety, a second question to be asked is whether the LGMA sufficiently ensures that such practices are continuously enforced or followed?

Two particular characteristics of the Agreement prompt this question. First, the non-mandatory entry into the LGMA makes it theoretically possible for producers to either avoid or opt out of the marketing agreement, removing themselves from the scope of GAP standards. Thus, there is no guarantee that if consumer concerns wane, a number of firms will not gradually opt out of the LGMA.

Second, the penalties for non-compliance are far less stringent than under alternative approaches, such as under Senator Florez's Plan.[134] This not only may provide an insufficient incentive for individual firms to comply with GAP guidelines, but also removes any concrete incentive the CDFA might have in thoroughly performing

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130. *Id.* ("[G]rasses and wetlands have the ability to filter up to 99% of E. coli during rain events.").

131. *Id.*

132. *See* Hopper, *supra* note 120 (quoting Scott Horsfall, CEO of the LGMA, stating that "There is a certain amount of scientific evidence that wildlife can be a carrier of E. coli..[s]o they are definitely one of the risk factors.").

133. *See, e.g.*, WILD FARM ALLIANCE, *supra* note 118 (critiquing the inclusion of deer and rodents as high risk animals).

134. *See* S.B. 200, 201, *supra* notes 44 and 46 (authorizing both civil and criminal penalties for non-compliance).

its auditing duties. These considerations will be expanded upon in the following paragraphs.

1. Can Consumer Demand Substitute For Compulsory Regulation?

Throughout early press releases, WGA and other industry associations repeatedly represented the LGMA and the array of GAPs under the plan as "mandatory."[135] However, there are several distinctions between the so-called "mandatory" guidelines of the LGMA and the requirements typically imposed under a primarily governmental approach. The most glaring is that produce firms are under no obligation to enter the Agreement. Nor is there an obligation of already-participating firms to remain within the LGMA. Under a traditional governmental regulatory plan, firms cannot choose to avoid periodic inspections, nor can they decide to ignore GAP or HACCP guidelines.[136] These two characteristics make it quite clear that the LGMA's provisions are not as legally "mandatory" as represented.

Instead of requiring universal GAP compliance by all firms, regardless of entry into a marketing agreement, LGMA relies upon market forces, such as consumer demand, to compel producers to enter the program and in turn comply with Agreement GAPs.[137] This is perhaps most evident based on the LGMA's specific targeting of handlers. Because growers must typically sell their crops to handlers (namely, grocers and processors), the Agreement effectively shifts the pressures of consumer demand onto handlers to purchase from growers which are in compliance with GAP guidelines. But recall that retail establishments, such as supermarkets, are exempt

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135. *See* Press Release, Western Growers Association, Western Growers Board Takes Action to Require Mandatory Food Safety Practices (Oct. 30, 2006), *available at* http://www.wga.com/public/active/siteBuilder/templateNewsReleasePopup.php?id=70.

136. Senator Florez's proposal included penalties for non-compliance by any grower. *Supra* note 64:

> 113365.8. (a) Any person who negligently or intentionally violates any state law or regulation, including any quarantine regulation, by importing any produce or other article, which by virtue of being pest infested or disease infected, causes an infestation or infection of a pest, animal, or disease, or causes an existing infestation to spread beyond any quarantine boundaries..is liable civilly in a sum not to exceed twenty-five thousand dollars($25,000) for each act that constitutes a violation of the law or regulation.

137. *See supra* note 73.

from the definition of "handlers."[138] Thus, grocers are unaffected by the LGMA.

Instead, responding to consumer concerns and the threat of lost business, many supermarkets and processors have independently imposed stringent super metrics on their suppliers (i.e. growers).[139] Indeed, the institution of such stringent standards does not appear to be motivated by a scientific effort to improve food safety, but rather, an effort to allay consumer concerns and maximize sales.[140] Although a marginal amount of growers' costs of compliance with both LGMA GAPs and handler super metrics are reflected in the price of crops, the relative market power advantages handlers have over growers typically equates to significantly under-market prices for large handlers such as supermarket chains,[141] thus shifting the ultimate burden of food safety costs back onto growers.

When consumer concern and demand for the safest products are at a peak, arrangements such as the LGMA tend to be effective at compelling the vast majority of handlers and growers to comply with the terms of the agreement.[142] The previously cited statistic of LGMA firms accounting for 90 percent of leafy produce output in California is strong evidence of this effectiveness.[143] The question, though, is whether a possible drop in consumer concern for food safety will lead to the relaxation of super metrics imposed by han-

138. LGMA, *supra* note 71, at Article II, Section A(6) ("'Handler' means any person who handles, processes, ships or distributes leafy green product for market whether as owner, agent, employee, broker or otherwise. This definition does not include a retailer.").

139. *See* Hardesty & Kusunose, *supra* note 104. Although specific super metrics have been released by some handlers (such as Walmart and Publix), they usually are considered a trade secret. The general trend is that imposition of super metrics by handlers is on the rise. *Id.*

140. *Id.* (noting that the increasing stringency of super metrics resembles an "arms race," and usually do not have a strong scientific basis).

141. *See, e.g.*, Hardesty & Kusunose, *supra* note 104; WILD FARM ALLIANCE, *supra* note 118 ("[compliance expenses] will not be passed onto the consumer but will come out of the [farmer's] net profit.").

142. *See, e.g.*, Brunke et al., *supra* note 73 (analyzing the use of a collective marketing order setting inspection and other quality assurance standards within the California pistachio industry, and finding that in the wake of food safety crises, "collective action is likely to be a helpful tool to ensure a safe product and increase benefits to producers and consumers"). This, however, assumes that there is adequate consumer awareness of the certification process and seal. *See* Florez, *supra* note 73 ("[M]ost Californians are so accustomed to buying leafy greens without a sticker they would never know something was missing.").

143. *See* Cone, *supra* note 69; Kohnke, *supra* note 10, at 510.

dlers, or an exodus of handlers from the LGMA to save the marginal increases in crop costs from grower compliance.

Simply put, the evidence does not provide a clear answer. On the one hand, because handlers possess greater market power and most of the costs of compliance are weathered by growers themselves,[144] it would appear that handlers have little incentive to reduce the standards which their suppliers must follow. In addition, recent historical trends have shown that market power disparity between processors or grocers and growers has been increasing.[145] Thus, it would appear that the LGMA's future membership should remain steady.

However, other historical trends make this conclusion at least somewhat questionable. In the pre-2006 era, when consumer concern for produce food safety was relatively low,[146] the imposition of such stringent super metrics by grocers and processors was rare.[147] Yet, for much of the late 90s and early 2000s, these entities still held considerable market power advantages over growers.[148] This would indicate that there is some correlation between consumer concern and stringency of super metrics imposed, and less correlation between market power disparity and the types of metric standards imposed by handlers.

Thus, whether or not a possible drop in consumer concern will lead to less participation in the LGMA is uncertain. But, as I suggest below, the addition of a "retainer" provision would eliminate any uncertainty at minimal cost to most participants. With such a modification, a resolution to the above question is unnecessary.

Another concern is that the voluntary nature of entry into the LGMA is currently allowing a few growers (the 10 percent of out-

144. *See* Hardesty & Kusunose, *supra* note 104, at 11.

145. *See, e.g.*, National Farmers Union, *Farm Crisis, EU Subsidies, and Agribusiness Market Power*, AG OBSERVATORY, (Feb. 17, 2000), http://www.agobservatory.org/library.cfm?filename=farm_crisis_eu_subsidies_and_agribusiness_mark.htm ("The farmers' decreasing share [of profit] is a direct result of processors' and retailers' increasing market power.").

146. *Compare* Press Release, Harris Interactive, *supra* note 21, *with* Jean C. Buzby & Richard C. Ready, *Do Consumers Trust Food-Safety Information?*, FOOD REVIEW, Jan.-Apr. 1996, at 46, *available at* http://www.ers.usda.gov/publications/foodreview/jan1996/frjan96h.pdf.

147. *See* Steve Gilman, *Food Safety Hits the Fan: Regulatory Action, Inaction, and Over-reaction and the Effects on Small Scale Growers*, NORTHEAST ORGANIC FARMING ASSOCIATION, http://www.nofa.org/policy/leafygreens.php (last visited Sept. 14, 2010) (noting that super metrics generally began to be imposed in response to the 2006 outbreak).

148. *See* National Farmers Union, *supra* note 145.

casts) to avoid any worry of complying with GAPs.[149] Some attribute this 10 percent to express exceptions in the LGMA's definition of "handlers," which exempts restaurants and independent grocers.[150] There have been reports of some non-compliant growers operating relatively successful businesses by selling crops to these LGMA-exempt firms.[151] Therefore, a handler otherwise operating one of the exempt establishments allows an outlet for a non-compliant grower to sell its crops, placing such items in the market for consumption. And while 10 percent of handlers seems insignificant, recall that a single contaminated leaf may cause a multi-state outbreak.[152] For this reason, *nearly* universal compliance is insufficient.

2. Sufficiency of LGMA Penalties

An even deeper problem with the LGMA is the relatively weak sanctions imposed upon a finding of non-compliance, creating two concerns.

The first concern is that the lack of monetary sanctions reduces any incentive for the CDFA to inspect as thoroughly as it might otherwise. As noted earlier, the maximum penalty for GAP violation is revocation of a handler's right to represent produce as grown in compliance with GAPs. The theory is, therefore, that because the CDFA does not benefit from finding instances of non-compliance, the agency may not be sufficiently compelled to thoroughly conduct audits to maximize the number of violations it finds per search. In other words, the imposition of fines acts as a type of "commission" for the agency, giving financial incentive for more stringent inspections.[153] The lack of fines under the LGMA, therefore, may lead to a practice of lenient enforcement of GAPs by the CDFA.

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149. *See* Cone, *supra* note 69; Kohnke, *supra* note 10, at 510.

150. *See* Hardesty & Kusunose, *supra* note 104 (stating that the small number of non-compliant farms is likely due to the ability to still sell to grocers and restaurants).

151. *See* Tracy Frisch, *The Coming Battle Over Food Safety*, THE VALLEY TABLE, Dec. 2009 - Feb. 2010, *available at* http://valleytable.com/article.php?article=002+Features%2FThe+coming+battle+over+food+safety (providing an account of an organic farmer who stopped dealing with the grocer Wegmans to avoid having to comply with GAPs. Nonetheless, the farmer still has been able to sell crops directly to consumers and restaurants and independent grocers which don't impose super metrics.).

152. *See supra* note 45.

153. *See* Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 16-17 (1974) ("[D]ifferent methods of improving the quality of enforcement [exist]. One discourages malfeasance by

It should be noted, however, that based on the percentage of firms with at least one minor violation, LGMA facility audit reports do not conclusively indicate a pattern of lax enforcement. In the 2007-08 annual report, approximately 42 percent of facilities inspected by the CDFA required corrective action.[154] On the other hand, the absolute percentage of checkpoint compliance (compliance with individual GAPs) is suspiciously high, at 99.25 percent.[155] The lowest category of checkpoint compliance, water use (requiring periodic self-testing and inspection of irrigation supply), still reported over 98 percent compliance.[156] After all, if nearly half of all facilities had been found in violation of GAPs requiring corrective action, even an apathetic mind would wonder whether those violations constituted the tip of the iceberg. What makes these astronomical compliance rates even more suspicious is that the majority of instances of non- compliance involved procedural deficiencies, such as insufficient recordkeeping and documentation of soil and water self-tests.[157]

But despite the astronomical reported rates of GAP compliance, contamination of produce has not been eliminated since enactment of the Agreement. In 2007, Metz Fresh,[158] a member of the LGMA, issued a massive recall of bagged spinach due to salmonella contamination.[159] In addition, Metz Fresh had never been decertified or even issued a notice of corrective action by the CDFA.[160] The continuation of outbreaks provides some evidence that the current compliance rate of GAPs is likely not as high as is represented. And although there is essentially no way to verify the accuracy of the

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raising the salaries of public enforcers, whereas the other encourages results by paying enforcers for performance, or on a piece-rate basis.").

154. ANNUAL REPORT, *supra* note 78, at 5.

155. *Id.*

156. *Id.*

157. *Id.* at 6-7.

158. Metz Fresh LLC, headquartered in King City, CA (in the heart of the Salinas Valley), is one of the largest spinach producers in the world. Cary Blake, *Food Safety Produce Leaders Want Level Playing Field Nationwide*, WESTERN FARM PRESS (Dec. 15, 2007, 12:00 AM), http://westernfarmpress.com/mag/farming_food_safety_produce/.

159. Center for Infectious Disease Research and Policy, *Spinach Recall Renews Debate Over Produce Safety*, CENTER FOR INFECTIOUS DISEASE RES. & POL'Y (Aug. 31, 2007), http://www.cidrap.umn.edu/cidrap/content/fs/food-disease/news/aug3107spinach-jw.html. Metz Fresh recalled over 8,000 cartons of bagged spinach. Company representatives stated, however, that most of the recalled spinach never reached consumers. *Id.*

160. *Id.* (noting that Metz Fresh was in compliance with the LGMA at the time of the outbreak).

CDFA's numbers, incentivizing more stringent auditing practices by the CDFA may nonetheless help eliminate prospective concerns of lax enforcement.

A secondary concern is that even if de-certification is seen as a significant penalty for growers and handlers which buy from non-compliant growers, the LGMA allows for a number of occurrences of non-compliance before any de-certification action is imposed. As discussed earlier, only "repeated or flagrant violations" (i.e. violations posing a significant risk to food safety) result in de-certification.[161] But to constitute a "repeated" violation, a grower must commit multiple "major deviations" (violations "inhibiting the maintenance of food safety but not necessarily resulting in unsafe product").[162] Further, it takes multiple "minor infractions" (practices not necessarily increasing the risk of foodborne illness) to equal a single "minor deviation."[163] In other words, growers are given substantial leeway before the threat of de-certification looms - working up the chain of violations, it takes dozens of minor infractions to constitute a single flagrant violation. Even when de-certification occurs, it is usually limited to two weeks - a relatively marginal period of time.[164]

In short, the schedule of penalties is so forgiving under the LGMA that only the most blatant patterns of non-compliance are sanctioned, allowing less blatant violations that still may adversely affect food safety.

C. Redeeming Qualities of the LGMA

While the above discussion points to a number of potential and current flaws of the LGMA, in reality, the LGMA advances perhaps the two most important virtues of a regulatory program - low state

161. *See* ANNUAL REPORT, *supra* note 78, at 6.

162. *Id.*

163. *Id.* at 6. In 2007-08, the CDFA found five flagrant violations. The only sanction imposed was temporary decertification for two weeks. Each of the decertified firms was recertified after the violations were corrected. Of 45 less severe "major deviations" found, 37 were due to recordkeeping deficiencies. However, accumulation of three major deviations constitutes a single flagrant violation. Further, multiple "minor deviations" (practices which did not necessarily increase the risk of foodborne illness) within one year constitutes a major deviation. Finally, multiple "minor infractions" within a year constitutes a minor deviation. Theoretically, therefore, a firm could be sanctioned with a minor deviation during each inspection throughout the year, and, at worst, lose certification for two weeks. *Id.*

164. *Id.* at 6-7.

costs and expediency. These redeeming qualities provide strong support for retaining, in some form, marketing agreements such as the LGMA as a tool for the improvement of food safety.

1. Industry's Assumption of Enforcement Costs

Even if the CDFA's auditing process may not be particularly thorough in practice, it is noteworthy that the entire auditing process costs the state essentially nothing. The LGMA assesses per-carton fees on its participants,[165] and approximately half of these funds are funneled to the CDFA for inspection duties. In other words, the collective fee paid by handlers operates as an investment of sorts – handlers voluntarily fund governmental oversight programs with the expectation that such oversight will reap future benefits primarily in the form of increased consumer demand (and, in turn, greater revenue). Such a setup is immensely important for states such as California, which have sustained massive budgetary deficits in recent years.[166] The setup of the LGMA is thus laudable in that it pays governmental institutions for mobilizing demand, creating a win-win situation for both the state and industry, with minimal public expenditures.

2. Time and Flexibility Advantages

In an area such as food safety, where an outbreak can occur without warning, the ability to change standards quickly in response to external forces is important.[167] However, under traditional agency

165. *See* LGMA, *supra* note 71, at Article IX, Section B ("Assessment shall not exceed five cents per carton along with annual assessment.").

166. *See, e.g.*, Kristin Kloberdanz, *The Great California Fiscal Earthquake*, TIME MAGAZINE (Jan. 8, 2009), http://www.time.com/time/nation/article/0,8599,1870299,00.html.

167. *See* Stearns, *supra* note 87, at 391-392 (describing the regulatory response after the 1993 Jack in the Box E. coli outbreak in 1993, discussed at *supra* note 4, as "prompt and significant," including a unilateral declaration by the USDA that E. coli O157:H7 constituted an adulterant under the Federal Meat Inspection Act, as opposed to rulemaking); Joseph A. Levitt, *CFSAN's Program Priorities: From Food Safety to Food Security*, 58 FOOD & DRUG L.J. 19, 21 (2003) ("Despite our best efforts, we cannot expect to prevent every foodborne illness outbreak. We should expect, however, that when an outbreak does occur, federal, state, and local authorities work together to identify the problem, perform traceback investigations, and remove the product or products from the market as quickly as possible..Indeed, faster outbreak response is one of the most substantial improvements in the food safety system over the past five years.").

operations, procedural constraints, including notice and comment periods and consideration requirements, slow down the process of rule promulgation.[168] Under the LGMA, new rules may be formed on the basis of a vote and a signature.[169] Assuming an equally-composed Board and a well-informed Secretary, the LGMA's setup is ideal within the food safety context, as it allows for the rapid creation of rules in times of crisis while harnessing the in-house industry experience of LGMA and CDFA actors. In other words, the setup, operating under these structural assumptions, avoids the typical "stickiness" of the agency rulemaking process, minimizing the time necessary to advance industry standards.

VI. ADJUSTING THE LGMA TO HARNESS THE ADVANTAGES OF MARKETING AGREEMENTS AND BETTER ENSURE FOOD SAFETY

Because of the importance of these strengths, full-fledged destruction of the LGMA is neither necessary nor desirable. Instead, the following discussion intends to establish that the deficiencies described above can be addressed by relatively marginal structural changes in the LGMA, while still retaining the benefits of low public costs and efficient standard promulgation.

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168. *See* Kohnke, *supra* note 10, at 515 (detailing the LGMA-sponsor Western Growers' argument that "unlike an inflexible piece of legislation, the quality of the GAPs could be constantly improved upon under an industry-driven approach..it can reflect the latest science, the latest data and the latest trends... A law is very difficult to change."); Stearns, *supra* note 87, at 392-394 (characterizing the FSIS' prompt declaration of E. coli as an adulterant, as opposed to following traditional rulemaking procedures as unexpected, and subsequently challenged by the meat industry on the ground that the declaration was "not promulgated through appropriate rulemaking procedures"); M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 156 (1995) (stating that within the context of promulgating labeling standards under the NLEA, "regulatory delay is a source of great frustration for Congress..Such delay is in part attributable to the increasing burdens placed on agency rulemaking (some of them by Congress), the sheer number of tasks assigned to agencies in statutes, and the enormous complexity entailed in contemporary rulemaking.").

169. LGMA, *supra* note 71, Article III, Section F(2) and Article III, Section D(2) ("To *recommend* to the Department rules and regulations relating to [the LGMA].") (emphasis added).

A. Correcting the Lack of Meaningful Agency Review and Practicability Concerns

As discussed in part IV, the numerical and financial domination of the LGAB by industry actors enables the body to create rules pending only Secretary approval. Because of this domination, the lone agency voice on the Board may be insufficient to call for notice and comment periods or other information-gathering techniques when necessary to make a reasoned decision. While this inability gives rise to the virtue of expediency, it still may preclude the possibility of data gathering even when time is not of the essence.

Adding composition requirements of the Board into the terms of the LGMA would help eliminate this potential. For instance, requiring an increased presence of public Board members (i.e. those representing public agencies) may allow agency voices to effectively call for more information-gathering sessions when the agency is under-informed on a particular proposed rule. The arrangement would help improve the ability of the CDFA to meaningfully assess the merits of the Board's proposals. At the same time, it would avoid the cumbersome procedural constraints typically imposed on agencies, as it can gather data only when it is deemed necessary.

A related concern articulated earlier is that under the LGMA, the rulemaking Board could be dominated by representatives from large firms, which may not be concerned with the economic constraints or the ability of small firms to comply with GAP guidelines. Further, the possibility of such one-sided composition could lead to predatory practices to drive smaller firms out of business.

Again, the corrective measure here is simple addition of Board composition constraints. In addition to increasing the number of public members, requiring reasonably representative Board membership based on firm size would help put small firm concerns on the map. A possible Board arrangement would continue the appointment power of the CDFA secretary, but require at least one seat to be allocated to a representative of a small firm. This would provide at least some representation to smaller firms to express their concerns with newly-proposed rules. And because of the increased role of the agency within the Board, a lone voice may be enough to precipitate further deliberation.

While the effectiveness of these proposals has yet to be observed within the specific context of the LGMA, structural changes to similar rulemaking boards in other areas have produced meaningful results. For instance, the National Labor Relations Board, an authoritative rulemaking body charged with the investigation and

combat of unfair labor practices, is composed of members appointed by the President. In the 1950s and 60s, the general practice of appointing members was to further the diversity of the board to create a balanced mix of business, labor, and state members.[170] Under this setup, compromise between labor and business flourished, as both productivity and wages increased.[171] However, the Board-appointment practice changed in the 1980s, and appointed members were most often associated with big business.[172] This change in Board composition lead to continued weak growth in worker productivity and significant decreases in the compensation of high school graduates.[173] The example of the NLRB and its historical appointment practices thus provides some indication that regulations altering the standards for board appointment can affect the progress of the entire program.

B. Preventing Regression in LGMA Participation

The addition of a penalty clause under the LGMA could ensure that in the event of waning consumer concern for food safety, individual firms will continue to participate in the Agreement and abide by GAP guidelines. As the LGMA is a contractual agreement between handlers, the CDFA, and the LGAB, the addition of a penalty clause, imposing a monetary schedule of forfeitures, may discourage the occurrence of LGMA dropouts. For instance, by adding a clause requiring participation in the contract for a set number of years, fees for the Agreement may be collected up front. If a firm defects, it automatically forfeits any amount paid towards the Agreement. In addition, extra fees could be assessed on such firms. Imposing monetary penalties may help discourage a decline in LGMA participation.

On the other hand, expanding consumer knowledge of the significance of LGMA participation presents an alternative and market-based approach to intrinsically enticing firms to remain in the LGMA. Since the LGMA's focus on handlers affirms that the program relies heavily on market forces such as consumer demand to

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170. *See* Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* 20 (MIT INDUST. PERFORMANCE CTR., Working Paper No. 07-002, 2007) (noting that under the Truman administration, appointment of NLRB Board members was diverse and equally balanced between business and labor representatives).

171. *Id.* at 33.

172. *Id.* at 39.

173. *Id.*

spur participation, expanding consumer awareness enhances the market-based deterrent effect of LGMA regression. A statewide public awareness campaign has begun, but is still largely limited to only internet media channels. Expanding the campaign to a more mainstream television campaign might help in improving consumer awareness, strengthening the incentive for firms to remain in the LGMA in the long-term.

C. Enhancing Enforcement

As the LGMA represents the public enforcement of largely privately created rules, the CDFA is not engaged in the enforcement of self-created rules. Because of this disconnect, it is important to provide incentives for the agency to vigorously enforce promulgated rules by allowing the agency to impose fines on non-compliant firms. Implementing a schedule of monetary penalties creates two basic effects. First, it may encourage firms to make greater efforts to assure compliance, in order to avoid the financial losses incurred from penalty.[174] Second, it may encourage CDFA auditors to conduct more stringent inspections, as the agency gains from finding more instances of non-compliance.

VII. CONCLUSION

Created in response to one of the largest food illness outbreaks in recent history, the LGMA represents a novel effort to allocate regulatory responsibility among industry and state. Indeed, the approach effectively harnesses the virtues of low public costs and efficient regulation creation on the fly. However, these positives may not be fully realized due to structural deficiencies in the terms of the Agreement. The diminished role of the state agency, increasing the chances of future promulgation of administratively arbitrary regulations and impracticable standards for smaller growers, inhibits the incorporation of evolving food safety principles into growing practices. Left unchecked, the numerical domination of the board by large firms, without the presence of offsetting agency or small firm voices, creates the propensity for rampant market abuse, incentivizes

174. *See* JEAN M. RAWSON, CONG. RESEARCH SERV., IB10037: MEAT AND POULTRY INSPECTION ISSUES (2000), *available at* http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-30.cfm (noting that the USDA recognized that the ability to impose civil fines would serve as an "effective deterrent" for violations).

a predatory rulemaking process, and may lead to the disposal of environmental concerns in growing processes.

While it is unclear whether the voluntary nature of entry into the Agreement has effectively harnessed consumer demand in compelling universal membership, the lack of a "retainer" provision, binding signatory handlers to the terms of the Agreement for a minimum time period, allows for the gradual waning of membership when consumer concern for produce safety declines, as has been observed in the previously voluntary regulatory framework for leafy produce. Finally, the Agreement's failure to impose sufficiently deterrent penalties further minimizes the LGMA's ability to induce substantive changes in growing practices, while simultaneously removing incentives for governmental agencies to conduct stringent audits.

But while the consequences of these deficiencies are substantial, they are neither creating obvious dilemmas today, nor are they particularly difficult to correct. With the appropriate modification of the LGMA's terms, the current budgetary crises many states are facing make national implementation of such a program both a viable and advantageous solution. A simple modification of the Agreement's terms to enhance the representativeness and governmental oversight of the Board, and to create a schedule of penalties for noncompliance, will help ensure that the LGMA reflects a new, cooperative effort at improving food safety – rather than a mere variant of the unsuccessful pre-outbreak framework.